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In The

Supreme Court of the United States

October Term, 1994

WILMA O'BRYAN, Parent and Next of Friend of JOHN C. O'BRYAN,

-and-

STATE FARM INSURANCE,

Petitioners,

vs.

VOLKSWAGEN OF AMERICA,

-and-

VOLKSWAGEN A.G.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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82 pp.

QUESTION PRESENTED

Does compliance with a Federal Motor Vehicle Safety Standard which establishes a minimum performance standard, preempt a state common law action based upon defective design and crashworthiness, or as the Eleventh Circuit has held in *Myrick*, does this Court's decision in *Cippollone*, as well as the clear, concise language of the Savings Clause, set out in the Safety Act, 15 U.S.C. § 1397(k), mean what it says, that "[c]ompliance with any Federal Motor Vehicle Safety Standard under this subchapter does not exempt any person from any liability under common law," and thus, state common law tort actions for defectively designed automobiles are not preempted and prohibited.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Wilma O'Bryan, Parent and Next Friend of John C. O'Bryan, hereby petition for a writ of certiorari to review the

judgment of the Sixth Circuit in this action. The Sixth Circuit upheld the lower court's ruling that the Federal Motor Vehicle Safety Standards, 15 U.S.C. §§ 1381-1431[1] preempted a common law cause of action based upon the defective design of a Volkswagen passive restraint system. The Sixth Circuit's affirmation of the trial court's ruling is directly contrary to this Court's holding in *Cippollone v. Liggett Group,* and the Eleventh Circuit's ruling in *Myrick v. Freuhauf,* as well as the clear, concise language of the Safety Act.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit (Case No. 93-5292/93-5314; Pet. App. B) was entered on November 1, 1994, and is not reported. The Order of the original panel of Judges, regarding the Petitioner's Petition for Rehearing En Banc, was entered December 14, 1994 (Pet. App. A). The trial court's ruling on federal preemption was entered on August 4, 1992 (Pet. App. C).

STATEMENT OF JURISDICTION

The original action was filed in federal District Court pursuant to diversity. The case was appealed and cross-appealed to the United States Court of Appeals for the Sixth Circuit.

The Petitioner's Petition for Rehearing to the Sixth Circuit was denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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1. On July 5, 1994, 15 U.S.C. §§ 1381-1431 was recodified by Congress, "without substantive change" at 49 U.S.C. §§ 30101-30169. However for the purposes of this writ and for simplicity sake, the Petitioner will continue to cite the Safety Act as 15 U.S.C.

STATUTORY PROVISIONS INVOLVED

The provisions of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1392-1431, as codified at all times relevant to this cause of action, provides in pertinent part:

15 U.S.C. § 1392

> (a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.
>
> * * *
>
> (d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or

motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal Standard.

* * *

(f) In prescribing standards under this section, the Secretary shall—

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

* * *

(k) Compliance with any Federal motor

> vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Congress' recodification of relevant sections of the Act are as follows:

> 49 U.S.C. § 30103. Relationship to other laws
>
> (b) PREEMPTION. – (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political division of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.
>
> (2) A State may enforce a standard that is identical to a standard prescribed under this chapter.
>
> * * *
>
> (e) COMMON LAW LIABILITY. – Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

* * *

49 U.S.C. § 30111. Standards

(a) GENERAL REQUIREMENTS. – The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.

(b) CONSIDERATION AND CONSULTATION. – When prescribing a motor vehicle safety standard under this chapter, the Secretary shall -

(1) consider relevant available motor vehicle safety information;

(2) consult with the agency established under the Act of August 20, 1958 (Public Law 85-684, 72 Stat. 635), and other appropriate State or interstate authorities (including legislative committees);

(3) consider whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which the standard will carry out section 30101 of this title.

The Secretary of Transportation, by an through its agent, NHTSA prescribed the following standards for seatbelts at FMVSS 208:

S4.1.2.1 First option-frontal/angular automatic protection.

The vehicle shall -

(a) at each front outboard designated seating position meet the frontal crash protection requirements of S5. 1 by means that require no action by vehicle occupants;

(b) at each front center designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) Either -

(1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7. 1 through S7.3, and that meets the requirements of S5. 1 with front test dummies as required by S5. 1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 Second option-head on automatic protection system.

The vehicle shall -

(a) At each designated seating position have a Type 1 seat belt assembly or a Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7. 1 and S7.2 of this standard.

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5. 1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5. 1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 Third option-lap and shoulder belt protection system with belt warning.

1. Except for convertibles and open body vehicles, the vehicle shall —

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7. 1 and S7.2 of this standard, and a seat belt warning system that conforms

to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (S571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5. 1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209(S571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209(S571.209) and to S7.1 and S7.2 of this standard.

STATEMENT OF THE CASE

The original question of federal preemption was raised by the Respondent, Volkswagen, in a Motion for Partial Summary Judgment filed with the trial court on August 12, 1991. The court overruled the Respondent's Motion on February 11, 1992, stating that the Savings Clause of the Act, 15 U.S.C. § 1392(k) foreclosed the question of federal preemption. This Court then rendered its decision in *Cippollone v. Liggett Group,* 112 S. Ct. 2608 (1993). Subsequent to this Court's ruling Volkswagen filed a Motion to Reconsider the trial court's preemption ruling, and on August 4, 1992, six days prior to trial, the court reversed itself and held that the Petitioner was preempted from maintaining a suit for

a defective passive restraint system under the Act, and the Petitioner could not introduce any evidence that the Volkswagen system contained no lap belt or other pelvic restraint, and refused the Petitioner the opportunity to compare the Volkswagen system with any other system that had an active lap belt. On August 21, 1992, despite the court's ruling, the Petitioner obtained a verdict in favor of the Petitioner.

On February 24, 1993, Volkswagen appealed the judgment on several grounds. Likewise, the Petitioner cross-appealed on March 3, 1993, the trial court's ruling on the issue of federal preemption, along with other issues. The Sixth Circuit heard oral arguments on the case on May 12, 1994, and handed down its decision on November 1, 1994, setting aside the trial court's verdict and entering a Judgment Notwithstanding the Verdict in favor of Volkswagen. The Sixth Circuit did not even consider the Petitioner's cross-appeal, thereby affirming the trial court's ruling on preemption. However, the Sixth Circuit entered a Judgment Notwithstanding the Verdict in favor of the Respondent, stating that the Petitioner did not put on any proof of alternative designs, proof that was denied the Petitioner by the trial court's preemption ruling at trial.

The issue of preemption is identical to the issues before this Court in the case of *Freightliner Corporation v. Myrick,* Supreme Court No. 94-286. As in *Myrick,* the issue before the Court is whether the Federal Motor Vehicle Safety Standards preempt common law actions brought against automobile manufacturers for defective design. The answer here, as it should be in *Myrick is* an unequivocal "No."

A. History of the Safety Act

In 1966, Congress passed the National Traffic and Motor Vehicle Safety Act, to regulate motor vehicle safety by

implementing national standards on vehicle performance. 15 U.S.C. § 1392. The Secretary of Transportation, established the National Highway Transportation Safety Administration (NHTSA) to determine exactly what those standards would be. The Act defines "motor vehicle safety standards" as:

> . . . a minimum standard for motor vehicle performance or motor vehicle equipment performance.

15 U.S.C. § 1391(2).

The Act specifies that NHTSA will promulgate *minimum* performance standards. The Act also provides that no state or other political agency shall have any authority to establish any aspect of performance that is not identical to the federal standard. 15 U.S.C. § 1392(d). However, the Act goes on to say that:

> Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

15 U.S.C. § 1397(k).

15 U.S.C. § 1397(k) has been called the "Savings Clause" of the Act. It is proof positive that Congress did not intend to preempt common law causes of action; on the contrary Congress wanted to provide that persons can maintain a cause of action, despite the manufacturers compliance with the minimum standards set forth by NHTSA. This is further evidenced by the records kept at the Congressional hearings on the Safety Act. At the time the Safety Act was being considered, Senator Warren Magnuson, stated that:

> [C]ompliance with federal standards would not necessarily shield any person from broad liability at the common law. The common law on product liability still remains as it was.

112 Cong. Rec. 14, 230 (1966).

Representative Dingell, the House Sponsor of the Bill, stated:

> [W]e have preserved every single common law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of the common law which are afforded to the purchaser, remain in the buyer, and they can be exercised against the manufacturer.

1132 Cong. Rec. 19, 663 (1966).

The Senate Commerce Committee reported that:

> [T]he federal minimum safety standards need not be interpreted as restricting state common law standards of care. Compliance with such standards would not necessarily shield any person from product liability at common law.

S. Rep. No. 1301, 89th Cong., 3rd Sess.[2].

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2. Reprinted in 1966 U.S. Code S. Admin. News 2709, 2720.

The House Committee on the Safety Act stated in its report that:

> [T]hat compliance with any federal motor vehicle safety standard does not exempt a person from liability under common law. It is intended, and this subsection (Sec. 108c of the House Bill) specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. (1966).

With the intentions of Congress clearly set out for them in the wording of the Act, and the statements of Congress itself, NHTSA set out safety standards for nearly all aspects of vehicle performance. The issues before the trial court related to the restraint system and the door latch system, and are found a section 208 and 206 respectively.

B. The Trial Court

This case involves a sixteen year old boy who was involved in a single vehicle accident. During the accident, the driver's side door came open, and the Petitioner was thrown from the vehicle. The car, a 1987 Volkswagen Jetta, contained a single strap passive restraint system that provided absolutely no pelvic restraint, and no protection from ejection if the door comes open. The Petitioner was left a paraplegic as a result of this accident.

The Petitioner filed suit in federal District Court under the theories of defective design of the seatbelt system and the door

latch system, as well as under a crashworthiness theory. The trial court initially ruled that the Petitioner could maintain an action for defective design and crashworthiness, however on the eve of trial, the court reversed itself and erroneously held that the defective design claims were preempted by the Safety Act, resting its decision squarely on the shoulders of the Eleventh Circuit's decision in *Taylor v. General Motors,* 875 F.2d 816 (11th Cir. 1989) stating that "the federal scheme provides manufacturers the choice among the three options and a proper exercise of that choice cannot be undermined by a lawsuit seeking civil liability on that basis," ignoring precedent from the Sixth Circuit in the case of *Sours v. General Motors Corp.,* 717 F.2d 1511 (6th Cir. 1983) which is directly on point on this issue. Additionally, prior to it's ruling on preemption, the trial court had the benefit of this Court's holding in *Cippollone,* however, the trial court chose to ignore the guidepost provided for them. The trial court refused to allow the Petitioner to compare the Volkswagen system to any other system, and went so far as to refuse to allow the Petitioner's counsel or witnesses to use the words "lap belt. " The trial went on under the crashworthiness claim and the Petitioner was awarded a verdict of 5.9 million dollars.

C. The Appellate Court

Volkswagen appealed to the United States Court of Appeals for the Sixth Circuit, on the issues of causation and insufficiency of evidence. The Petitioner cross-appealed, taking exception with the trial court's rulings regarding federal preemption and subsequent remedial measures. The Sixth Circuit held that "the plaintiff's proof in such cases[3] must include competent evidence of some practicable, feasible, safer, alternative design." (Pet. App. B). The Sixth Circuit found that the Petitioner failed to show

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3. The court of appeals is referring to "crashworthiness" cases as set out in *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

"some practicable, feasible, safer, alternative design," and therefore granted Volkswagen a Judgment Notwithstanding the Verdict. What the court of appeals failed to consider was that the trial court's erroneous preemption ruling forbade the Petitioner from putting on the very evidence that the court of appeals thought was needed. The court of appeals did not consider the avowal exhibits that the Petitioner introduced to the trial court, and attached as exhibits to the appellate briefs, that evidenced the fact that Ford and General Motors both added manual lap belts to their passive restraint systems. (Pet. App. E, & F). Nor did the court of appeals consider the avowal documents which reflect Volkswagens inquiry to NHTSA seeking permission to install a manual lap belt. (Pet. App. G). Nor did they consider the document that evidences the fact that NHTSA responded to the Volkswagen inquiry by stating that "Volkswagen's passive upper torso restraint and a separate active lap belt do not violate S7.2(b)." (Pet. App. H). The court of appeals failed to review any of the Petitioner's avowal evidence that proved safer alternative designs that were excluded by the trial court's erroneous ruling. Nor did the Sixth Circuit consider the fact the evidence excluded by the trial court's preemption ruling was directly related to proving causation. Petitioner's evidence included proof of other manufacturers use of manual lap belts to provide occupant restraint in case of door openings as well as for rollover protection.

Subsequent to the opinion of the Sixth Circuit panel, the Petitioner filed a Petition for Rehearing and was summarily denied in a one paragraph opinion of the same panel.

REASONS FOR GRANTING THE WRIT

The trial court's ruling that FMVSS 208 preempts a state common law cause of action for a defectively designed passive restraint system is both erroneous and inconsistent with the law of

other Circuits and the Supreme Court of the United States. By granting Volkswagen's Motion for Partial Summary Judgment, based upon federal preemption, the trial court summarily prohibited the Petitioner from introducing evidence of other practicable, feasible, safer, alternative designs. The trial court held that because Volkswagen was afforded three options under FMVSS 208 and the company chose to exercise Option Two, that provided the occupant with protection for only frontal crashes with an entirely passive system, the Petitioner was thus prohibited from criticizing the Volkswagen restraint system for lack of any additional protection. The only quantitative requirement that Volkswagen had to meet was the head injury requirement. Volkswagen did not have to meet the rollover requirement or the angular impact requirement. The trial court went further and prohibited the Petitioner from introducing evidence of other alternative designs and prohibited the Petitioner from comparing the Volkswagen passive restraint system with systems utilized by other manufacturers. Finally, the trial court's preemption ruling prohibited, the Petitioner from introducing comparative studies indicating the Volkswagen passive restraint system to be the least effective of all of the restraint systems utilized by automobile manufacturers.

When the matter was appealed by Volkswagen to the Sixth Circuit, the appellate court, in its Opinion, recognized this cause of action as being based upon a crashworthiness theory and stated at page 10, (Pet. App. B) that the Petitioner's proof in such cases must include competent evidence of some practicable, feasible, safer, alternative design. The Sixth Circuit was very clear in its Opinion reversing the jury verdict and granting a Judgment NOV for the Defendant, Volkswagen, that the Petitioner had failed to prove a crucial aspect of his case; that another design would have remedied the problems of which the Petitioner complains (Pet. App. p. 11). In essence, the appellate court reversed the jury verdict based upon its Opinion that a crashworthiness case

requires proof of a safer alternative design and its conclusion that Petitioner had failed to introduce such proof.

With regard to the Petitioner's cross-appeal regarding the trial court's preemption ruling which prohibited the introduction of other safer designs, the court of appeals never considered the effect of the lower court's preemption ruling. Certainly had the trial court not granted the partial summary judgment on preemption, the Petitioner would have introduced to the jury the very evidence that the Petitioner introduced to the court by avowal. The jury would have heard evidence that Ford Motor Company informed NHTSA that it would be incorporating a manual lap belt with its passive restraint system (Pet. App. E). That General Motors informed NHTSA of its concerns about a passive restraint system without any rollover protection., and that General Motors Corporation would be adding a manual lap belt to its passive restraint system (Pet. App. F). Certainly, the Petitioner would have introduced into evidence at the trial of this action that Volkswagen inquired of NHTSA if it would be permitted to add a manual lap belt to its passive system (Pet. App. G). Additionally, the Petitioner would have introduced NHTSA's response to the Volkswagen inquiry that yes, Volkswagen could like other manufacturers, incorporate a manual lap belt with its passive restraint system and this act would not nullify its certification under Option Two granted by FMVSS 208 (Pet. App. H).

Additional avowal exhibits that were prohibited from being introduced at the trial of this action by the court's preemption ruling included Avowal Exhibit #2, which indicated that Volkswagen attempted to incorporate a manual lap belt with its passive restraint system, but was unable to meet the Head Injury Criteria Performance Standards with the addition of a manual lap belt, and thus discarded the idea. The record contains other avowal exhibits that established the ineffectiveness of the Volkswagen system when compared to other restraint systems

that incorporated manual lap belts, pelvic restraint and protection particularly in collisions involving rollovers.

The trial court's ruling on preemption is clearly erroneous. The trial court based its preemption ruling squarely upon the Eleventh Circuits holding in *Taylor v. General Motors,* 875 F.2d 816 (11th Cir. 1989). The Taylor case in an airbag decision and like *Wood v. General Motors Corp.,* 865 F.2d 395 (lst Cir. 1990), which stood for the proposition that there is no expressed preemption mandated by the Safety Act. Both *Taylor* and *Wood* however, hold an implied preemption exists, in spite of the clear and unambiguous language of the savings clause in the Act. The Act clearly states that the standards issued by NHTSA provide minimum performance requirements. 15 U.S.C. § 1391(2). The fact that Congress had the foresight that common law would seek to encourage manufacturers to not only meet, but to exceed these minimum standards is obvious when the House and Senate reports are read with the Safety Act itself.[4]

Prior to the trial court's granting of the partial summary judgment on preemption, the Supreme Court had rendered its decision in *Cippollone v. Liggett Group, Inc.,* 112 S. Ct. 2608 (1992) which stands for the proposition that where a Federal Statute contains an expressed preemption clause and that clause provides a reliable indicium of congressional intent with respect to state authority, a court should not consider implied theories of preemption. The trial court in this case, chose to ignore *Cippollone* and its effect on *Taylor,* as well as the law from its home Sixth Circuit which is set forth in the decision of *Sours v. General Motors Corporation,* 717 F.2d 1511 (1983), wherein it was held:

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4. *Chrysler Corporation v. Dept. of Transportation,* 472 F.2d 659 (6th Cir. 1972); *Sours v. General Motors Corporation,* 717 F.2d 1518 (6th Cir. 1983); *see also, Federal Consumer Safety Legislation, Heffron, et al.,* 1970 pp. 22-23.

> second and perhaps more telling, the very federal safety statute upon which GM relies makes it abundantly clear that compliance with the regulations promulgated thereunder does not immunize a manufacturer from common law liability. 15 U.S.C. § 1397 (C).

Id. at 1517.

Subsequent to this trial court's granting of preemption based upon the Eleventh Circuit decision in *Taylor v. General Motors Corporation,* the Eleventh Circuit, relying upon *Cippollone,* reversed itself and overruled *Taylor v. General Motors* as it recognizes implied preemption in the Safety Act. In the decision of *Myrick v. Freuhauf Corp.,* 13 F.2d 1516 (11th Cir. 1994), the Eleventh Circuit interpreted *Cippollone* to prohibit consideration of implied preemption when there is an express preemption provision in the statute. Specifically, the *Myrick* court was addressing and considering the Safety Act and the regulation relating to antilock brakes. In discussing the application of the *Cippollone* rule to various statutes, the court stated at 1525,

> none of our sister Circuits that have considered application of the Cippollone rule to various statutes have yet found a preemption clause that was not a reliable indicium of congressional intent.

In discussing that the Supreme Court did mean what it said in *Cippollone,* the *Myrick* court stated at 1522:

> So far as we can ascertain, no circuit has yet had to temerity to to tell the Supreme Court that it did not mean what it said in *Cippollone,* and we decline the manufacturers invitation to be the first one to do so.

Finally, in the *Myrick* decision the court recognized that other Circuits have interpreted the *Cippollone* decision in the same fashion. The court stated at 1522:

> The manufacturers and their amici suggest that we err by reading *Cippollone* to mean what it says about not considering implied preemption when there is an express preemption provision in the statute. If we do err we are in good company because at least eight of sister circuits have reached the same conclusion about the meaning of the *Cippollone* decision, citing *Greenwood Trust Co. v. Massachusetts,* 971 F.2d 818, 823 (lst Cir. 1992); *Toy Mfrs. of America, Inc. v. Bluementhal,* 986 F.2d 615, 623 (2nd Cir. 1992) *Worm v. American Cyanamid Co.,* 5 F.3d 744, 747 (4th Cir. 1993); *Stamps v. Collagen Corp.,* 984 F.2d 1416,1420 (5th Cir. 1993); *Kinley Corp. v. Iowa Utilities Bd.,* 999 F.2d 354, 358 (8th Cir. 1993); *Draper v. Chiapuzio,* 9 F.3d 1391 (9th Cir. 1993) and *Cleveland v. Piper Aircraft Corp.,* 985 F.2d 1438, 1447 (10th Cir.)

In addition to the *Cippollone* decision by the Supreme Court of the United States, and the nine Circuits that have held that there is no federal implied preemption, the Supreme Court buttressed its position in the post *Cippollone* decision of *CSX Transportation, Inc. v. Easterwood,* 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993). The *CSX* case involved the Federal Railroad Safety Act and its potential preemption of a state common law cause of action. The Federal Railroad Safety Act contains both a preemption clause and a savings clause similar to the clauses found in the Safety Act. The case law on this issue is clear, *Wood*

and *Taylor,* still stand for the proposition that there is no express federal preemption under the Act, and *Cippollone* and *CSX,* stand for the proposition that there is no implied preemption under the Act.

When considering exactly what Congress intended with the Safety Act, one need only look at the language of the Safety Act, its preemption clause and its savings clause. These items clearly provide a reliable indicium of congressional intent with respect to state authority and certainly prohibits implied theories of preemption, the very holding in *Cippollone.* If that clear concise language is not enough, the court need only turn its attention to the House Committee Report of 1966 when the Act was being considered, where it states:

> Common law liability – Section 108(c) of the reported bill 15 USC 1397(c) provides that compliance with any Federal motor vehicle safety standard does not exempt a person from any liability from any liability under common law.
>
> It is intended, and this subsection specifically establishes that compliance with safety standards is not to be a defense of otherwise to affect the rights of parties under common law particularly those relating to warranty, contract and tort liability.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966).

The entire legislative history of the Safety Act demonstrates that preemption provisions of the Safety Act, which include the savings clause are in fact a reliable indicium of congressional intent.

The trial court's preemption ruling prohibited the Petitioner from criticizing Volkswagen for its failure to provide pelvic restraint, rollover protection, and prevented the introduction of evidence of feasible, safer, alternative designs. The Sixth Circuits's Opinion setting aside the Petitioner's jury verdict and entering a Judgment NOV on behalf of Volkswagen failed to consider the affect of the trial court's preemption ruling and was based upon the failure of Petitioner to introduce evidence of safer alternative designs. The avowal documents attached in the appendix of this Writ clearly establish that Petitioner had ample evidence of safer alternative designs that would provide added protection and prevent ejection in rollover collisions where doors are open.

The trial court's preemption ruling and the affirmance of that ruling by the Sixth Circuit are directly in conflict with (a) the Supreme Court of the United States' decision in *Cippollone* and *CSX*, (b) contrary to the Eleventh Circuit's decision in *Myrick v. Freuhauf* and the decisions of the other eight Circuits post *Cippollone,* and (c) in conflict with the longstanding rule of the Sixth Circuit established in *Sours v. General Motors.* This Court must grant certiorari in this action to remedy the inconsistencies between the holding of the trial court, and its affirmance by the Sixth Circuit, with the prior rulings set out above.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — SIXTH CIRCUIT'S ORDER DENYING PETITION FOR REHEARING EN BANC DATED DECEMBER 14, 1994

Nos. 93-5292/5314

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILMA O'BRYAN, PARENT AND NEXT FRIEND OF JOHN C. O'BRYAN,

Plaintiff-Appellee-Cross-Appellant,

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Intervenor-Appellee,

v.

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Defendants-Appellants/Cross-Appellees.

ORDER

BEFORE: SUHRHEINRICH, BATCHELDER, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

Appendix A

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — SIXTH CIRCUIT'S OPINION FILED NOVEMBER 1, 1994

NOT RECOMMENDED FOR PUBLICATION

No. 93-5292/5314

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAD O'BRYAN,

Plaintiff/Appellee,

v.

VOLKSWAGEN OF AMERICA,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BEFORE: SUHRHEINRICH, BATCHELDER, and DAUGHTREY, Circuit Judges.

PER CURIAM. This case is based on an automobile "crashworthiness" claim for injuries sustained when the 16-year old plaintiff, Chad O'Bryan, drove a 1987 Volkswagen Jetta off the road in excess of the 55-mile-per-hour speed limit. The plaintiff alleges that defects in the door latch and the passive restraint system caused or contributed to his injuries in this severe accident, during which the vehicle ran off the road at high speed, hit and climbed an embankment, rolled over, then struck three telephone-pole size logs while upside down, and "pole-vaulted"

on one of the logs. The seat belt emergency release mechanism was crushed when one of the logs pierced the windshield on the driver's side. The log continued through the interior of the car, stretching the door frame and allowing the door to open. The plaintiff was thrown out of the car, and the car finally came to rest on him, crushing his eighth thoracic vertebra and rendering him a paraplegic. After trial in the district court, the jury returned a general verdict for $5,930,499.74, apportioning 85 percent of the fault to Volkswagen of America and Volkswagen AG (collectively referred to below as "Volkswagen") and 15 percent to the plaintiff.

Volkswagen seeks reversal of the judgment below, on the grounds that it was entitled to judgment as a matter of law. Volkswagen asserts that the plaintiff's proof was insufficient to establish either that a defect existed or that a defect, if one existed, caused Chad O'Bryan's injuries. Alternatively, Volkswagen seeks a new trial, claiming that the trial court (1) erroneously admitted into evidence a test which was not substantially similar to the circumstances of the accident and which was misrepresented as implicit in a federal safety standard; (2) allowed improper argument during plaintiff's counsel's closing argument; and (3) failed properly to instruct the jury. Volkswagen also asserts that plaintiff failed to exercise ordinary care, thus barring any recovery. The plaintiff counterclaims that, in the event that a new trial is granted, certain pretrial rulings by the district court should be reversed. The district court ruled prior to trial that federal regulations preempted any state law claim regarding the absence of a lap belt in the restraint system's design. The district court also refused, under Fed. R. Evid. 407, to allow evidence of subsequent remedial measures.

After a careful review of the record, we conclude that the

plaintiff failed to establish causation and that the defendant, Volkswagen, is therefore entitled to a judgment in its favor as a matter of law. We thus pretermit discussion of those issues raised on appeal that are not directly related to causation.

On the evening of the accident, between 8:00 and 9:00 p.m., Chad O'Bryan was driving his mother's Volkswagen Jetta near Brandenburg, Kentucky. The speed limit on the segment of the highway where the accident occurred is 55 miles per hour. The Jetta was equipped with the VWRA passive restraint system, comprised of a two-point belt (right hip to left shoulder on the driver's side, attached to the door so that no affirmative action was needed to put it in place; the emergency release mechanism was near the door mounting), a specially designed seat (which minimized movement), and a "knee bolster" (a structure under the steering wheel designed to absorb and prevent forward movement through femoral contact). The system was thus totally passive. The seatbelt system utilized an ignition interlock system that prevented ignition when the seatbelt release was open. If the seatbelt was disengaged after the car was started, a warning light came on and a chime sounded. All of these systems were inspected after the accident and found to be operational, indicating that the seatbelt had not been disengaged prior to the accident.

The highway on which Chad O'Bryan was travelling curves to the left at the accident site.[1] Skid marks on the road indicated that he made a sudden steering change to the right, which caused the wheels to "yawn, or skid sideways. There was no evidence that the brakes had been applied. No mechanical problems were

1. Plaintiff remembers nothing regarding the accident, and so all information as to the accident sequence comes from accident reconstruction techniques and witnesses.

found with the Jetta that would have caused the accident. No other cars were involved in the accident.

After leaving the road, the car crossed over a ditch, struck an embankment, climbed the embankment, and struck two or three of a group of three large logs at the top of the embankment. At this point the car was upside down and moving forward. One log hit the roof of the car with such force that the roof was peeled back and upward on the driver's side. Another log came diagonally across the hood of the car from the right front corner, penetrated the upper left corner of the windshield, struck the seatbelt emergency release mechanism, and then hit the driver's side pillar. The car "pole-vaulted" on this log, stretching the door frame like a rubber band and releasing the door latch. The log was carried with the vehicle for approximately 55 feet. The log and vehicle then separated, and the rear of the car dug into the ground, causing it to rotate in the opposite direction. As the Jetta fell toward the ground, O'Bryan was ejected from the car. Moving slightly ahead of the vehicle, he came to rest on the ground and the Jetta finally landed on top of him. Estimates as to the total distance travelled by the vehicle (including yaw marks) varied from 260 feet to 282 feet. Estimates as to the initial speed of the vehicle varied concomitantly, from just over 55 miles per hour to 74. Plaintiff's experts characterized the accident as "minor to moderate", while defense experts described it as "extremely severe". One of Volkswagen's experts offered unrefuted testimony that the log that hit the driver's side of the car had a longitudinal force of over 10,000 pounds on impact.

At trial, the plaintiff advanced two design defect theories, alleging that absent the purported defects, there would have been no injury or the injuries would have been less severe. The first theory relates to the mounting of the seat belt and the positioning

of the seat belt emergency release mechanism near the door. The plaintiff argued that the door-mounted belt was defective in that it offered no restraint if the door came open, a not uncommon occurrence in rollover accidents.[2] Plaintiff's experts testified that ejection of car occupants through opened doors was a leading cause of fatalities and serious injury. They also suggested that attachment to a motorized track above the door was "better" or "superior" to the Jetta's mechanism but, significantly, they did not establish that the alternate system would have prevented the harm in this accident. As Volkswagen argued, no proof was adduced to show that the motorized attachment would not have activated when the door flew open in this accident. The plaintiff's proof did make reference to a three-point design by General Motors, which like the VWRA is attached to the door. Again, no evidence was introduced to show that this alternate design would have ensured that the plaintiff remained in the car. Moreover, given the fact that one log peeled back the roof of the car and that the car continued to roll after that, it was incumbent upon the plaintiff to prove that he would have been injury-free if restrained in his seat. Our review of the record indicates that the issue of whether or not O'Bryan would have been injured had he remained in the car was raised, at least superficially, during the trial but was never established by competent proof one way or the other.

Plaintiff's experts also testified that, in their opinion, the emergency release mechanism should have been located between the two front seats, as with conventional active seat belt systems. Again, no proof was given that the seat belt would have remained intact if the emergency release mechanism had been located somewhere other than near the door mounting.

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2. Volkswagen's experts testified that attachment of the seat belt to the door was another mechanism to hold the door shut in the event of a crash.

Appendix B

The plaintiff's second theory of defect relates to the design of the door latch. Plaintiff's experts claimed that the Jetta door latch was defective because it came open during the accident sequence. Plaintiff's experts also offered their opinion that stretching of the door[3], caused by bending of the car's body during the rollovers, activated and released the latch mechanism. To determine this, the plaintiff's experts constructed a series of "door pull tests", which they performed on four Jetta doors. In this test, they removed the doors from the car bodies and bolted them by their hinges to heavy metal tables. They then pulled on the door striker with a cable, causing the door to stretch and thereby activating the latch. Through this process, they created damage similar to that of the subject door. They testified that the latch activated at a force of around 1600 pounds and that the door achieved a similar level of deformation at 1950 pounds. Plaintiff's experts then referred to Federal Motor Vehicle Safety Standard 206[4], which specifies requirements for automobile door

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3. Volkswagen's experts claimed that stretching of the *door frame,* rather than the door itself, allowed the door to open.

4. FMVSS 206 is codified in 49 C.F.R. § 571.206 and expressly prescribes that compliance be demonstrated by testing in accordance with paragraph 4 of Society of Automotive Engineers Recommended Practice, J839b. J839b contains a three-part test. The first part tests the ability of the latch to withstand "longitudinal load"; i.e., the "ability of the vehicle latch and striker . . . to withstand a test load perpendicular to the face of the latch". The latch, when fully closed, and mounted in isolation according to specific procedures, must not be pulled apart by a load of 2500 pounds. The second part tests the ability of the latch to withstand a "transverse load"; i.e., the latch and striker must be able to withstand a load of 2000 pounds in the direction of the door opening. The third part tests the ability of the latch, *when contained in the door latch system (including the door latch, striker assembly, outside handle, key cylinder and any connecting mechanisms),* to remain fully latched when subjected to an inertia load of 30 grams in any direction. Plaintiff's (Cont'd)

latch strength, and implied that the Jetta door somehow failed to meet that standard. Clearly, however, the Jetta far exceeded that standard.

In determining whether the evidence is legally sufficient to support a jury verdict, the evidence, and the reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party. *Fite v. First Tennessee Prod. Ass'n,* 861 F.2d 884 6th Cir. 1988). A reviewing court may not consider the credibility of witnesses nor weigh the evidence, because to do so would "substitute the court's opinion for that of the jury. *Frost v. Hawkins County Bd. of Educ.,* 851 F.2d 822, 826 (6th Cir. 1987). In addition, a reviewing court may not set aside the jury verdict merely because the opposite conclusion could have been reached or because different inferences could have been drawn. Rather, we must determine whether any reasonable jury could have reached the verdict based on the evidence presented at trial. This same standard governs review of the district court's denial of a Rule 50(a) motion for judgment as a matter of law. *Agristor Leasing v. A.O. Smith Harvestore Prods.,* 869 F.2d 264, 268 (6th Cir. 1989).

Where a legal issue is presented, the *de novo* standard of review applies. *Loudermill v. Cleveland Board of Education,* 844 F.2d 304, 308 (6th Cir.), *cert. denied,* 488 U.S. 941, 946 (1988). In addition, where the relevant state supreme court has not spoken

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(Cont'd)
experts subjected the "door latch system" to 1900 pounds, rather than 30 grams. The test process speaks to the same issue for which they purportedly tested. If the Jetta door latch system as a whole withstood 1900 pounds, it could surely have met the 30 gram requirement. Plaintiff's experts claimed that, at 1650 pounds pressure, the remote rod triggered the latch. The remote rod is a "connecting mechanism" within the meaning of the J839b procedure.

on an issue of state law, we are called upon to discern how that court would respond if confronted with the issue. *Bailey v. V & O Press Co.*, 770 F.2d 601, 604 (6th Cir. 1985).

Volkswagen's principal contention on appeal is that the plaintiff failed to establish sufficient causal connection between the alleged defects and the injuries sustained by Chad O'Bryan. Under Kentucky law, the plaintiff has the burden of establishing that the circumstances surrounding the accident were such as to justify a reasonable inference of probability, rather than a mere possibility, that the alleged design defects were responsible for the injuries. *Hersch v. U.S.*, 719 F.2d 873, 878 (6th Cir. 1983) (quoting *Perkins v. Trailco Mfg. and Sales Co.*, 613 S.W.2d 855, 85758 (Ky. 1981)).

It is, of course, within the jury's province to determine which expert to believe. Where expert testimony is supported by nothing more than conjecture and supposition, however, it is not entitled to be credited by the jury. *Calhoun v. Honda Motor Co.*, 738 F.2d 126, 132 (6th Cir. 1984) (applying Kentucky law). Hence, when the plaintiff's proof does not rise to the level of establishing that the alleged defect was the probable cause of the accident or the resulting injuries, but merely offers a possible cause in a series of possibilities, it is insufficient to establish liability. *Id.*, at 133. Moreover, when alternate causes are presented that could have caused the plaintiff's injury, the burden is on the plaintiff to establish that the alleged defect is the probable, as opposed to a possible, cause. *Midwestern Volkswagen Corp. v. Ringley*, 503 S.W.2d 745 (Ky. 1973).

In this case, the plaintiff does not claim that any defect caused the accident, but merely contends that he would have had no or fewer injuries if not for the alleged defects. This argument

reflects a "crashworthiness" claim, such as that originally recognized in *Larsen v. General Motors Corp.*, 391 F.2d 495, 503 (8th Cir. 1968). *Larsen* has been widely followed in other jurisdictions but has not been applied by either the Sixth Circuit or the Kentucky courts.[5] In crashworthiness cases, courts deny recovery unless the plaintiff establishes, by competent expert testimony, that the defect was responsible to some degree for enhancement of injury to the plaintiff.[6] The plaintiff's proof in such cases must include competent evidence of some practicable, feasible, safer, alternative design. *See. e.g., Caiazzo v. Volkswagenwerk. A.G.*, 647 F.2d 241, 250-51 (2nd Cir. 1981); *Huddell v. Levin*, 537 F.2d 726, 737 (3d Cir. 1976).

Volkswagen argues that the plaintiff has failed to prove two crucial aspects of his case: first, that absent either of the alleged

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5. The U.S. district court for the Eastern District of Tennessee has embraced the *Larsen* crashworthiness doctrine. *Higgs v. General Motors Corp.*, 655 F. Supp. 22 (1985) (applying Tennessee law), *aff'd without opinion*, 815 F.2d 80 (1987). *See also Wooten v. White Trucks*, 514 F.2d 634 (5th Cir. 1975) (applying Kentucky law and assuming a crashworthiness doctrine).

6. The trial court here instructed the jury to that effect, without objection from the plaintiff's counsel. The plaintiff nevertheless argues that this case is "not really a 'crashworthiness' case" but strictly a products liability case. He criticizes the concept of "enhanced injuries" employed in crashworthiness cases, on the ground that in some cases, injuries are indivisible and it is impossible to decide what injuries would have occurred absent the alleged defect. This argument is unpersuasive, particularly in light of Kentucky's statutory adoption of comparative fault, K.R.S. 411.182, which necessitates the same allocative process. Principles of comparative negligence apply to products liability actions under Kentucky law. *Ingersoll-Rand Co. v. Rice*, 775 S.W.2d 924, 930 (Ky. App. 1989); *see also, Reda Pump Co.. Dir. of TRW, Inc. v. Finck, Ky.*, 713 S.W.2d 818 (Ky. 1986). Hence, we conclude that use of a crashworthiness analysis does not conflict with existing Kentucky law.

defects, he would have remained uninjured or would have sustained a lesser injury and, second, that another design would have remedied the problems of which the plaintiff complains. Essentially, Volkswagen argues that no design could have withstood the forces to which the plaintiff's Jetta was subjected. Volkswagen points out, correctly, that although the plaintiff's experts opined that a motorized track or a three-point passive system is "better" or "superior", they failed to establish that a different restraint system would have prevented or diminished Chad O'Bryan's injuries.

Regarding the door latch, the plaintiff points to testimony that he was not injured while inside the Jetta, but was hurt only after ejection. The plaintiff infers that, had the door not opened and had he remained in the car, he would have come through the accident unharmed. In truth, one of the experts called by the plaintiff did testify that O'Bryan would have remained unharmed if he had not been ejected from the car, but this witness stated no basis for his opinion. Given the condition of the roof after the accident and the fact that the Jetta hit the ground at the terminus of its "pole vault" in an inverted position and continued to roll, this assertion appears to have no factual basis. Indeed, one of Volkswagen's experts testified that Chad O'Bryan would have experienced fatal head, brain, neck and chest injuries, based on the circumstances of the wreck and the ultimate condition of the car.

Moreover, the plaintiff proposed no alternate design for a more crashworthy door lock, nor did he address the possibility that the door opened because the surrounding structure stretched out of contact with the latch mechanism. The tension-type latch used in the Jetta is widespread in the industry, and even experts for the plaintiff testified that the Jetta's latch met the applicable

federal standard, FMVSS 206. These experts, with their "pull test," essentially proposed a different, additional standard, one that would cover "the door as a whole" (removed from the door frame). However, there are no means to evaluate this proposed standard, or the Jetta's performance thereunder, absent broader data regarding existing practice within the industry.

Based on the evidence in the record before us, we conclude that the plaintiff failed to prove causation. A judgment entered in the defendant's favor as a matter of law would have been proper as to both of the plaintiff's theories. We therefore REVERSE the district court's judgment and enter judgment in favor of the defendant.

APPENDIX C — DISTRICT COURT'S MEMORANDUM OPINION AND ORDER DATED AUGUST 4, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

CIVIL ACTION NO. 89-0059-O(CS)

WILMA O'BRYAN, Parent and Next Friend of JOHN C. O'BRYAN

PLAINTIFF

v.

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN AG

DEFENDANTS

MEMORANDUM OPINION

This matter is before the court on motion of the defendants, Volkswagen of America, Inc. and Volkswagen AG (hereinafter collectively "Volkswagen"), for reconsideration of this court's denial of their motion for partial summary judgment.

Volkswagen sought summary judgment in this products liability action to the extent that the claims of the plaintiff, Wilma O'Bryan, Parent and Next Friend of John C. O'Bryan (hereinafter "O'Bryan"), sought to establish liability based upon the lack of a manual lap belt for the driver's seat in O'Bryan's 1987 Volkswagen Jetta.

In our memorandum opinion of February 11, 1992, we held that:

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1. O'Bryan's common law claims were not expressly preempted by the provisions of the Safety Act, 15 U.S.C. § 1392(d);

2. A genuine issue of material fact existed with respect to Volkswagen's compliance with the minimum performance requirements of Federal Motor Vehicle Safety Standard 208 ("FMVSS 208").

Volkswagen argued that O'Bryan's claims relating to lack of a manual lap belt were impliedly preempted by FMVSS 208 and its enabling legislation, the Safety Act. We noted in our opinion that implied preemption arises where there is an actual conflict between a state statute, regulation or common law rule and a federal regulatory scheme. Volkswagen claimed that its choice not to utilize a manual lap belt with its automatic seat belt protection system could not be challenged by O'Bryan via a state common law claim because the federal regulatory scheme, as set out in the pertinent part in FMVSS 208, permitted Volkswagen to make such a choice.

It was unclear from Volkswagen's earlier memoranda as to which of the three FMVSS 208 seat belt options it contended it had certified compliance. Further, Volkswagen's purported compliance was disputed in some aspects by O'Bryan. Thus, our analysis of the implied preemption argument was not necessitated.

FMVSS 208 allows automobile manufacturers to market vehicles in which the manufacturer has installed a passenger protection system which is certified as meeting the requirements of any of three designated options. The options are delineated as:

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1. Frontal/angular automatic protection system (S4.1.2.1);

2. Head-on automatic protection system (S4.1.2.2); and

3. Lap and shoulder belt protection system with belt warning (S4.1.2.3).

The manufacturer is required to certify compliance with all applicable federal motor vehicle safety standards.

Volkswagen's ability to preclude a challenge to its choice of option under the federal scheme is dependent upon its showing that it met the requirements of the federal regulations with respect to its choice of option. Only when Volkswagen has shown that it complied with the regulations can it claim, under an implied preemption theory, that a state common law challenge to its federally authorized choice in its design would frustrate the administrative scheme provided by federal law.

There was some confusion in the defendant's explanation of its purported compliance with FMVSS 208. The briefs and argument addressed both Option 1 and Option 2. We addressed both options in our memorandum opinion of February 11, 1992, finding that a genuine issue of material fact existed with respect to Volkswagen's compliance with either option.

Volkswagen has asked the court to reconsider our ruling and find that it complied with Option 2. Option 2 states:

S4.1.2.2 *Second option — head-on automatic protection system.* The vehicle shall —

(a) At each designated seating position have

a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

Volkswagen states that it substituted an automatic belt as permitted by S4.5.3 for the Type 1 or Type 2 seat belt assembly required in Option 2. S4.5.3 provides:

S4.5.3 *Automatic belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option.

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> S4.5.3.1 An automatic belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly.

S4.5.3 states that an automatic belt may be used to meet the crash protection requirements of any option under S4. Volkswagen argued in its original motion, without providing any documentation in support, that when it utilized an automatic belt in place of a Type 1 or Type 2 belt under Option 2, it was required to meet only the crash protection requirement of S5.1 in a perpendicular impact.

In looking at the safety requirements of the various options, we reasoned from a common sense standpoint that NHTSA intended the options to be equally stringent in their testing requirements. Option 1 requires a protection system to meet the lateral crash protection requirements of S5.2 and the roll-over crash protection requirements of S5.3. An alternative to those requirements is the use of a Type 1 or Type 2 seat belt under either Option 1 or Option 2. We noted in our opinion that Type 1 and Type 2 seat belts have certain built-in protections inasmuch as the very design of those belts, as set out in FMVSS 209, requires that they provide pelvic restraint "designed to remain on the pelvis under all conditions, including collision or roll-over of the motor vehicle." We found it reasonable to assume, therefore, that a permissible substitution for a Type 1 or Type 2 seat belt would require equivalent safeguards in the substitute in order to "meet the crash protection requirements of any option under S4," as required by S4.5.3.

Volkswagen has now come forward with evidence, in the

form of a number of agency interpretations, establishing that NHTSA has not interpreted "the crash protection requirements" of Option 2 to include the Type 1/Type 2 seat belt feature of "pelvic restraint designed to remain on the pelvis under all conditions, including collision or roll-over of the motor vehicle." In other words, NHTSA has not required that an automatic belt substituted under S4.5.3 be an equivalent belt to the Type 1 or Type 2 seat belt it is replacing in either design or performance. The automatic belt must only meet the frontal crash protection requirements of S5.1 in a perpendicular impact. See Exhibit A to Volkswagen's Motion to Reconsider. The January 30, 1974 notice published at 39 FR 3834 (Volkswagen's Exhibit B to Motion for Reconsideration) stated specifically:

> Option two exists, in fact, to accommodate the introduction of passive restraint systems like Volkswagen's which cannot yet meet all requirements of option one.

The United States Supreme Court has instructed that a reviewing court should give effect to the agency's interpretation of its own regulations; that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations. *Martin v. Occupational Safety and Health Review Commission*, ___U.S.___, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1992), citing *Ehlert v. United States*, 402 U.S. 99, 105, 91 S. Ct. 1319, 1323, 28 L. Ed. 2d 625 (1971), and *Northern Indiana Public Service Co. v. Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15, 96 S. Ct. 172, 173, 46 L. Ed. 2d 156 (1975).

Volkswagen has demonstrated through agency interpretative letters that NHTSA viewed it own regulations as providing that compliance with Option 2 required a manufacturer to meet the

frontal crash requirements of S5.1 in a perpendicular impact when substituting an automatic belt for a Type 1 or Type 2 seat belt under S4.5.3. The affidavit of Michael Finkelstein, a former associate administrator of NHTSA, supplements the agency's interpretation. He stated that "NHTSA was satisfied that the a [sic] 1987 VW Jetta equipped with a Volkswagen passive restraint system complied with both the requirements and the intent of the NHTSA regulations pertaining to occupant crash protection." Finkelstein affidavit, ¶ 4.

We next consider whether this agency interpretation conforms to the purpose and wording of the regulations.

A plain reading of the regulations does not preclude the interpretation rendered by the agency. In fact, the interpretation appears consistent with the agency's expressed purpose of accommodating the introduction of passive restraint systems. The agency's interpretation of its own regulations sensibly conforms to their wording and the purpose expressed by the agency. It cannot be said to be at odds with the policy explaining the purpose of S4.5.3, the regulation which allows the substitution. We must therefore give effect to the agency interpretations. We find that in order for Volkswagen to substitute its automatic belt under S4.5.3, it was required to meet the frontal crash protection requirements of S5. 1 in a perpendicular impact, as set out in FMVSS 208, S4.1.2.2(b) and (c).

O'Bryan has not challenged nor has she come forward with evidence to directly controvert Volkswagen's contention that its system met the frontal crash protection requirement of S5.1, as delineated under Option 2. The bald statement that "as the court will see in the trial of this action, the system adopted by Volkswagen was inferior and they had trouble meeting the frontal

crash protection requirements with their passive system containing a single belt attached to the door," (O'Bryan's Memorandum in Opposition to Volkswagen's Motion for Reconsideration at p. 10), is insufficient to survive a summary judgment motion. O'Bryan has submitted the affidavit of Lynn L. Bradford, a former senior official at NHTSA, which states, in pertinent part, that:

> 1. No defect investigation was conducted by NHTSA into the restraint system of the particular system in the 1987 Volkswagen Jetta;
>
> 2. In NHTSA frontal impact testing conducted with 1975-model VW Rabbits equipped with similar systems, some restraints failed to meet the criteria of FMVSS 208; and
>
> 3. The responsibility for exercising due care in the design and manufacture of safe vehicles and for certifying compliance with the regulations rests with Volkswagen.

These assertions do not create a genuine issue of material fact with respect to Volkswagen's satisfaction of the frontal crash protection requirements of Option 2 or its certification of compliance with FMVSS 208.

A party moving for summary judgment has the burden of showing that there are no genuine issues of fact and that the movant is entitled to summary judgment as a matter of law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 151-60, 90 S. Ct.

1598, 16 L. Ed. 2d 142 (1970); *Felix v. Young,* 536 F.2d 1126, 1134 (6th Cir. 1976). Not every factual dispute between the parties will prevent summary judgment. The disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.,* 106 S. Ct. 2505, 2510 (1986). The dispute must also be genuine. The facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the nonmoving party. *Id.* at 2510. The disputed issue does not have to be resolved conclusively in favor of the nonmoving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288-89 (1968). The evidence must be construed in a light most favorable to the party opposing the motion. *Bohn Aluminum & Brass Corp. v. Storm King Corp.,* 303 F.2d 425 (6th Cir. 1962).

The contentions in the Lynn Bradford affidavit that NHTSA did not perform any defect investigation with respect to the Jetta, that compliance was Volkswagen's responsibility, and that Volkswagen had some problem with the system when used in the 1975 Rabbit, are not responsive to the issue asserted on summary judgment: that Volkswagen certified compliance with FMVSS 208 and that its system in the 1987 Jetta met the frontal crash protection requirements of S5.1 in a perpendicular impact, as set out in S4.1.2.2(b) and (c).

Upon complying with the requirements of FMVSS 208, Volkswagen was permitted by the federal regulation to market its wholly automatic system. The question then becomes whether a recovery on O'Bryan's common law claims against Volkswagen for its choice not to utilize a manual lap belt in its protection

system (*i.e.*, to market a wholly automatic system) would frustrate the administrative scheme provided by the federal law.

The United States Court of Appeals for the Eleventh Circuit, in *Taylor v. General Motors,* 875 F.2d 816, 827 (11th Cir. 1989), found the ruling in *Fidelity Federal Savings and Loan Association v. de la Cuesta,* 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982), governed in its implied preemption analysis:

> *de la Cuesta* governs this case. It holds that a state common law rule cannot take away the flexibility provided by federal regulation, and cannot prohibit the exercise of a federally granted option. *See id.* In accordance with *de la Cuesta,* we conclude that a state common law rule that would, in effect, remove the element of choice authorized in Safety Standard 208 would frustrate the federal regulatory scheme. We therefore hold that appellants' theory of recovery is impliedly preempted by Safety Standard 208 and the Safety Act.

Taylor, 875 F.2d at 827. In finding implied preemption, the court noted that:

> In the 1974 amendment to the Safety Act, Congress expressly approved the right of an automobile manufacturer to comply with the Safety Act either by installing manual seat belts or passive restraints. . . . consistent with Congress' 1974 mandate, the regulations promulgated under the Safety Act authorized

> automobile manufacturers to choose one of three different methods to comply with the safety standards for occupant crash protection. . . .

Taylor, 875 F.2d at 826. The court concluded that Taylor's theory of recovery, a strict liability or negligence claim for failure to equip an automobile with an air bag, was impliedly preempted.

Similarly, in another "air bag case," the United States Court of Appeals for the First Circuit stated in *Wood v. General Motors Corp.*, 865 F.2d 395, 409 and 412 (1st Cir. 1988):

> We think it plain that Wood's action, if successful, would stand as an obstacle to Congress's chosen *method* of increasing automobile safety. . . . While "courts should not lightly infer preemption," Wood's product liability action must bow to the supremacy of federal law because it disturbs the Safety Act's allocation of authority between the federal government and the states.

The court noted:

> While "the purpose and scope" section of a federal standard may well be the starting point in defining "aspect of performance," the inquiry cannot end there. In our view, resort must be had to the specific requirements and categories of the standard. . . .

Appendix C

> Congress, in enacting the Safety Act, set up a clear division of authority between the states and the federal government. If the federal government has not issued a safety standard on a certain aspect of performance, the states are allowed to set their own standards in these areas. However, Congress decided that once the federal government had promulgated a standard, the states' usual role in setting safety standards was subordinated in the interest of national uniformity. When a federal standard is in effect, the states are prohibited from establishing a nonidentical standard . . . .
>
> This division of authority between state and federal government was part of Congress's chosen method for implementing the Safety Act. . . .
>
> Thus, although Wood's air bag suit is not expressly preempted by the Safety Act, it is impliedly preempted because it presents an "actual conflict" with the Safety Act — specifically because it "stands as an obstacle" to Congress's determination that safety is best served by having uniform national standards.

We find that O'Bryan's claim relating to Volkswagen's lack of a manual lap belt mounts essentially the same attack on the federally sanctioned choice of option as did the claims relating to lack of an air bag in *Taylor* and *Wood*. In the air bag cases, the plaintiffs sought to penalize the defendants for choosing not to

incorporate a passive component in their protection system. Here, O'Bryan would have Volkswagen penalized for choosing not to incorporate a manual component in its passive protection system. As was found in the air bag cases, the federal scheme provides manufacturers the choice among the three options and a proper exercise of that choice cannot be undermined by a lawsuit seeking civil liability on that basis.

The motion for partial summary judgment has sought only limited preclusion of O'Bryan's claims. Volkswagen seeks summary judgment insofar as O'Bryan's claims are based upon the lack of a manual lap belt in the Volkswagen passive restraint system. Volkswagen is entitled to judgment on this limited issue.

A separate order will be entered this date in conformity herewith.

This 4th day of Aug., 1992.

s/ Charles R. Simpson III
CHARLES R. SIMPSON III
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

CIVIL ACTION NO. 89-0059-O(CS)

WILMA O'BRYAN, Parent and Next Friend of JOHN C. O'BRYAN

PLAINTIFF

v.

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN AG

DEFENDANTS

ORDER

For the reasons set forth in the memorandum opinion entered herein this date, and the court being otherwise sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGED that:

1. The memorandum opinion and order of February 11, 1992 is vacated only insofar as it (a) finds that "a genuine issue of material fact exists with respect to the matter of compliance with the crash protection requirements of the second option," (b) finds that "nothing in S4.5.3 relieved Volkswagen from meeting the safety requirements of the belts which it replaced in the second option," and (c) orders that the motion for partial summary judgment is denied.

2. The memorandum opinion herein is supplemental to and should be read in conjunction with those portions of the

memorandum opinion and order of February 11, 1992 which have not been vacated.

3. The motion of the defendants, Volkswagen of America, Inc. and Volkswagen AG, for reconsideration is GRANTED.

4. Partial summary judgment is GRANTED for the defendants, Volkswagen of America, Inc. and Volkswagen AG, only insofar as the plaintiff, Wilma O'Bryan, Parent and Next Friend of John C. O'Bryan, seeks to establish liability of the defendants based upon lack of a manual lap belt in O'Bryan's 1987 Volkswagen Jetta.

This 4th day of Aug., 1992.

s/ Charles R. Simpson III
CHARLES R. SIMPSON III
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

APPENDIX D — DISTRICT COURT'S MEMORANDUM OPINION AND ORDER DATED FEBRUARY 11, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

CIVIL ACTION NO. 89-0059-O(CS)

WILMA O'BRYAN, Parent and Next Friend of JOHN C. O'BRYAN

PLAINTIFF

v.

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN AG

DEFENDANTS

MEMORANDUM OPINION AND ORDER

This matter is before the court on motion of the defendants, Volkswagen of America, Inc. and Volkswagen AG (hereinafter "Volkswagen") for partial summary judgment.

The defendants seek dismissal of all claims made by the plaintiff, Wilma O'Bryan, Parent and Next Friend of John C. O'Bryan (hereinafter "O'Bryan"), insofar as they are based upon the lack of a manual lap belt for the driver's seat in O'Bryan's 1987 Volkswagen Jetta.

O'Bryan, a minor, was operating the vehicle when it left the highway, striking a number of logs and rolling over before coming to rest. O'Bryan was thrown out during the accident and

the automobile rolled over his body, leaving him paralyzed. The car was equipped with a passive restraint in the form of an automatically operated two-point seatbelt anchored behind the driver's right side at floor level and behind the driver's upper left side in a track located on the door. A specially designed seat and knee bolster were also included. It is undisputed that the door opened during the crash. O'Bryan's claims, in part, are that the vehicle itself and/or its seatbelt/safety restraint system:

1. Malfunctioned (Count II);

2. Was sold in a defective condition, unreasonably dangerous to the users and consumers (Count III);

3. Was not merchantable and fit for the purpose for which it was manufactured (Count V); and

4. Was negligently designed, manufactured and sold (Count VI).

Although not specifically articulated in the complaint, the plaintiff has described her claims in pretrial conference and oral argument as encompassing several theories, including 1) defectiveness due to the absence of a manually operated lap belt to restrain a driver in addition to the passive two-point belt installed in the car, and 2) defectiveness due to the anchor point of the passive restraint being located on the door, a moveable member, rather than on a fixed frame member.

The summary judgment motion attacks only the plaintiff's claims insofar as they are based on the lack of a manually operated lap belt. The product liability, negligence and warranty claims implicate the lack of a manual lap belt, both as to

defectiveness and as evidence of a feasible design alternative to the two-point passive belt system Volkswagen actually utilized in the 1987 Jetta.

Volkswagen contends that it cannot be held liable for failing to install a manual lap belt in the automobile inasmuch as the Federal Motor Vehicle Safety Standard 208 ("FMVSS 208") allowed it the option of adopting a wholly passive restraint system. It is urged, therefore, that the federal regulation has both expressly and impliedly preempted claims relating to the selection of this particular type of restraint utilizing driver-passive automated closing.

A

We reject Volkswagen's express preemption argument. Volkswagen asserts that O'Bryan's common law claims are expressly barred by the preemption provision of the Safety Act, 15 U.S.C. sec. 1392(d):

> Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

FMVSS 208 defines the federal safety standard for passenger-side passive restraint systems. The court must first look to the

plain language of the statute in determining the meaning of the legislation. *Bradley v. Austin,* 841 F.2d 1288 (6th Cir. 1988). If it is unambiguous, the language is regarded as conclusive unless there is a clearly expressed legislative intent to the contrary. *United States v. Premises etc.,* 736 F.2d 1129 (6th Cir. 1984).

The court must also consider 15 U.S.C. sec. 1397(k). *See Wood v. General Motors Corp.,* 865 F.2d 395 (1st Cir.), *cert. denied,* __ U.S. __, 110 S. Ct. 1781, 108 L. Ed. 2d 783 (1990) ("In construing statutes, our role is to give effect to them as written and as a whole, not to enforce one section at the expense of another.").

Title 15, United States Code, Section 1397(k) provides that "compliance with any Federal motor vehicle safety standard issued under this title does not exempt any person from any liability under common law."

> A savings clause exists as a specific exception to a general preemption clause: it is designed to save a specific subset of legal expressions that would otherwise be preempted. Thus, while we are *generally* obligated to give a broad construction to the word "any" as used in the preemption clause, we are *specifically* obligated to give great breadth to it use in the savings clause.

Wood, 865 F.2d at 420-421. Adoption of a construction of 15 U.S.C. sec. 1392(d) that would preclude common law claims in the regulated area would undermine the express language of sec. 1397(k). The United States Court of Appeals for the Third Circuit stated in *Pokorny v. Ford Motor Co.,* 902 F.2d 1116, 1121 (3d

Cir.), *cert. denied,* __ U.S. __, 111 S. Ct. 147, 112 L. Ed. 2d 113 (1990):

> Section 1397(k) specifically recognizes that compliance with a particular federal safety standard, like Standard 208, does not exempt Ford from common law liability. *See Dawson v. Chrysler Corp.*, 630 F.2d 958 (3d Cir. 1980), *cert. denied,* 450 U.S. 959, 101 S. Ct. 1418, 67 L. Ed. 2d 383 (1981). The savings provision cannot be limited to matters not covered by the federal standards. . . . The language of sec. 1397(k) does not reasonably support that narrow construction. *See Taylor,* 875 F.2d at 824 ("Such a construction would render the savings clause a mere redundancy since the preemption clause itself provides that where a federal standard does not govern 'the same aspect of performance' as the state standard, the state standard is not pre-empted."). [footnote omitted]. We also note that sec 1392(d), the pre-emption provision, does not specifically mention common law liability. In the pre-emption clauses of many other statutes, Congress has explicitly referred to common law actions when it wished to pre-empt them [citations omitted].

Additionally, a strong presumption exists against finding express preemption in areas such as the provision of tort remedies, areas traditionally regarded as properly left within the purview of the states. *See Taylor,* 875 F.2d at 823, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L.

Ed. 1447 (1947). *See also, Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963).

In reading sec. 1392(d) and sec. 1397(k) together, therefore, we conclude that O'Bryan's common law claims are not expressly preempted.

B

Volkswagen claims that the Safety Act and FMVSS 208 impliedly preempt O'Bryan's claims.

Implied preemption arises where there is an actual conflict between a state statute, regulation or common law rule and a federal regulatory scheme.

> Our analysis begins with the principle that federal law preempts state law when state law creates a "potential frustration of the administrative scheme provided by [the federal law]," *Howard v. Uniroyal, Inc.* 719 F.2d 1552, 1562 (11th Cir. 1983), or when the state law "interferes with the methods by which the federal statute was designed to reach [its] goal." *International Paper Co. v. Ouellette,* 479 U.S. 481, 494, 107 S. Ct. 805, 813, 93 L. Ed. 2d 883 (1987).

Taylor, 875 F.2d at 825-6. "Federal regulations have no less preemptive effect than federal statutes." *Fidelity Federal Savings & Loan Association v. DeLaCuesta,* 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73 L. Ed. 2d 664 (1982).

Appendix D

We begin our analysis with FMVSS 208 and its enabling legislation, the Safety Act. The court noted in *Pokorny,* 902 F.2d at 1123, that "Standard 208 was specifically designed to give automobile manufacturers a choice among several options when providing restraint systems for passengers." The choice was between a wholly passive system, a wholly manual system, or a combination. Volkswagen chose to implement a wholly passive system in the 1987 Jetta. Under the regulation, Volkswagen was fully permitted to market a vehicle utilizing a wholly passive restraint system if that system met the minimum performance standards of FMVSS 208. Volkswagen contends that its choice not to utilize a manual lap belt cannot be questioned. However, the governmental imprimatur approving such a choice is only extended to a manufacturer when the design has met the regulation's safety requirements.

The question of whether the system utilized in the Jetta met the requirements of FMVSS 208 is contested in this case. Volkswagen certified compliance with the regulation. That purported compliance is questioned by O'Bryan.

There is some question as to the option or options Volkswagen contends its passive restraint system met. In its memorandum it contends that it met the first option. By letter submitted to the court after oral argument on the motion, Volkswagen suggests that the second option is the one upon which it relies. We will address both analyses.

O'Bryan contends that the system did not meet the lateral and rollover crash test requirements under the first option. There being a genuine issue of material fact in this regard, partial summary judgment must be denied.

Appendix D

Volkswagen states that its restraint system complied with the second option, which requires satisfaction of the frontal crash protection requirements of S5.1 in a perpendicular impact. Volkswagen explains that it substituted its automatic belt system for the Type 1 or Type 2 seat belt assembly required under the second option, in accordance with S4.5.3. Volkswagen contends that the only crash protection requirement under the second option is the frontal crash protection requirement found at S4.1.2.2(b), and it thus had no obligation to meet any lateral or rollover crash test requirements.

Contrary to Volkswagen's assertion, there is a rollover and collision requirement applicable under the second option. It requires the incorporation of a Type 1 or Type 2 seat belt assembly. A "Type 1 seat belt assembly is a lap belt for pelvic restraint." A "Type 2 seat belt assembly is a combination of pelvic and upper torso restraints." FMVSS 209 at S3. As noted by Volkswagen, S4.5.3 permits a manufacturer to incorporate a seat belt assembly which requires no action by the occupant (referred to as an "automatic belt"), in place of any other seat belt assembly required by the option, to meet the crash protection requirements of that option.

The crash protection requirements for Type 1 and Type 2 seat belt assemblies must be met by the substituting automatic belt. The requirements for seat belt assemblies are found at S4 of FMVSS 209. S4.1(b) sets out the pelvic restraint requirement applicable to both Type 1 and Type 2 seat belts:

> A seat belt assembly shall provide pelvic restraint whether or not upper torso restraint is provided, and the pelvic restraint shall be designed to remain on the pelvis under all

> conditions, including collision or roll-over of the motor vehicle. . . .

It is arguable that an automatic belt which has no pelvic restraint component cannot meet the crash protection requirement of a secure pelvic restraint during collision or rollover, therefore, such a belt could not be substituted for a Type 1 or Type 2 seat belt.

However, assuming for the sake of argument that Volkswagen's automatic belt system could be substituted for a Type 1 or Type 2 seat belt, even in the absence of a pelvic restraint component, that automatic belt must meet the requirement of secure restraint during collision and rollover equivalent to that provided by a Type 1 or Type 2 seat belt assembly.

Volkswagen's argument that there is no lateral or rollover crash test requirement for the second option ignores the fact that collision and rollover protection requirements are incorporated within the standards for Type 1 and Type 2 seat belts. Clearly, it was unnecessary for the drafters to repeat the crash protection requirements incorporated elsewhere in the standards. Since the Type 1 and Type 2 belts themselves must meet the requirements of S4.1(b) of FMVSS 209, collision and rollover protection was thus already incorporated.

Nothing in S4.5.3 relieved Volkswagen from meeting the safety requirements of the belts which it replaced in the second option. Indeed, S4.5.3 specifically states that an automatic belt may be used *to meet the crash protection requirements* of any option under S4.

Further, the reading which Volkswagen would have this

court give the various options under S4 would result in strict scrutiny of wholly passive systems under the first option, but very limited scrutiny of combination systems in which an automatic belt has been substituted under the second option. That does not appear to be the intent of the drafters of the regulations as reflected by the entire regulatory scheme.

There is a genuine issue of material fact with respect to the matter of compliance with the crash protection requirements of the second option.

For the reasons set forth hereinabove and the court being otherwise sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGED that the motion of the defendants, Volkswagen of America, Inc. and Volkswagen AG, for partial summary judgment is DENIED.

This 11th day of February, 1992.

s/ Charles R. Simpson III
CHARLES R. SIMPSON III
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

APPENDIX E — PLAINTIFF'S TRIAL COURT AVOWAL EXHIBIT 3, FORD MOTOR COMPANY LETTER TO NHTSA SETTING FORTH FORD'S INTENTION TO INCORPORATE ACTIVE LAP BELTS WITH PASSIVE SYSTEMS

Plaintiff's Exhibit
AVOWAL 3

FORD

Ford Motor Company

The American Road
Dearborn, Michigan 48121

December 14, 1978

Ms. Joan B. Claybrook
Administrator
National Highway Traffic
Safety Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Ms. Claybrook:

Re: Petition for Amendment of Federal Motor Vehicle Safety Standard No. 210 - Seat Belt Assembly Anchorages

Ford Motor Company (Ford), pursuant to Section 124 of the National Traffic and Motor Vehicle Safety Act, as amended, and 49 CFR, Section 552.3, submits this Petition for Amendment of Federal Motor Vehicle Safety Standard (FMVSS) No. 210, Seat Belt Assembly Anchorages (49 CFR 571.210) hereinafter "the Standard". Ford requests the Standard be amended to exempt

active lap belts used in conjunction with passive upper torso restraints from the location requirements specified in S4.3.1.1.

Ford plans to offer in two of its 1980 passenger cars an optional passive belt restraint system for front seat occupants. This optional passive belt system will include a passive upper torso restraint, knee bolsters and an active lap belt. The active lap belt when used will provide additional protection to occupants in side and rollover type accidents. The passive belt system will comply with the passive restraint criteria required by Section 4.5.3 of FMVSS 208 with and without the active lap belt being employed. One of the design configurations of the active lap belt being developed, however, does not meet the anchorage location requirements of the Standard.

In this design, the lap belt retractor will be located on the inboard side of the bucket seat and its anchorage is located forward of the zone specified in Section 4.3.1.1 of the Standard. This configuration will permit forward motion (translation) of the occupant in a crash, which in turn will allow the occupant's knees to contact the knee bolster — a desirable circumstance. We believe permitting increased forward translation of the occupant will result in more efficient distribution of impact forces during a frontal collision.

As the Administration indicated in its preamble to Docket 72-23; Notice 5, published November 16, 1978, ". . . the agency has determined manufacturers should be given wide latitude in passive belt design in order to facilitate the early introduction of passive systems. . . . " In a similar sense, this request for amendment will contribute to earlier introduction of passive systems. Further, if this petition is not granted on a timely basis, it could hinder our efforts to introduce a passive belt option prior to the required incorporation date.

Appendix E

As Ford intends to certify that vehicles equipped with the passive belt meet the injury requirements of Standard 208 with and without the active lap belt, and because the additional active lap belt will provide added protection in side and rollover accidents, we believe this petition, if granted, should contribute to the safety of front seat occupants.

Ford, therefore, respectfully requests that the last sentence of S4.3 of Standard 210, Seat Belt Assembly Anchorages (49 CFR 571.210) be amended as follows (added text indicated by underlining):

> "S4.3 . . . Anchorages for passive belt systems that meet the frontal crash protection requirements of Standard No. 208, and active lap belt systems installed in conjunction with such passive belt systems, are exempt from the location requirements of this section."

Very truly yours,

s/ J. C. Eckhold
J. C. Eckhold
Director
Automotive Safety Office

EXHIBIT F — EXCERPT OF PLAINTIFF'S TRIAL COURT AVOWAL EXHIBIT 4, GENERAL MOTORS' FILING WITH NHTSA SETTING FORTH GM'S INTENTION TO INCORPORATE A BELT-TYPE PELVIC RESTRAINT WITH THE PASSIVE SHOULDER BELT

GENERAL MOTORS CORPORATION

RESPONSE TO

THE DEPARTMENT OF TRANSPORTATION

PROPOSAL ON

OCCUPANT CRASH PROTECTION

OST DOCKET 44, NOTICE 76-8

SEPTEMBER 17, 1976

Appendix F

USG 1440 Part III

Environmental Activities Staff
General Motors Corporation
General Motors Technical Center
Warren, Michigan 48090

September 17, 1976

The Honorable
William T. Coleman, Jr., Secretary
Department of Transportation
Nassif Building
Washington, D.C. 20590

Dear Mr. Secretary:

Enclosed are General Motors comments on notice of proposed rulemaking, OST Docket 44, Notice 76-8, Occupant Crash Protection, published June 14, 1976. We would be pleased to meet with you or members of your staff to discuss any of the issues related to this proposal.

Very truly yours,

s/ David E. Martin
David E. Martin, Director
Automotive Safety Engineering

Enclosure

Appendix F

GENERAL MOTORS CORPORATION

RESPONSE TO PROPOSAL TO

AMEND MVSS 208—

OCCUPANT CRASH PROTECTION

(OST DKT. NO. 44; N. 76-8)

September 17, 1976

* * *

Appendix F

D. *Passive Shoulder Belt Performance*

For reasons which are discussed later in this paper a passive shoulder belt appears to be the only currently known passive belt system which is both potentially acceptable to at least some consumers and capable of meeting the proposed test requirements. Unfortunately, there is far too little publicly available data concerning the passive shoulder belt restraint system's performance in accidents to permit making an effectiveness estimate for this system. The 22 accident cases presented at the January 27, 1976 National Motor Vehicle Safety Advisory Council meeting are the only ones of which we are aware involving such a restraint concept. However, our testing indicates that such restraints may have significant performance limitations. These tests were conducted using an experimental passive shoulder belt installed in a GM sub-compact vehicle.

Two potential problems should be discussed here. During a 30 mph lateral dolly rollover test conducted using the FMVSS 208 test procedure, a passive shoulder belt restrained, 50% tile dummy initially positioned in the outboard front seating position on the low side of the vehicle was completely ejected from the passenger compartment. We believe this result demonstrates that a belt type pelvic restraint must be combined with the passive shoulder belt to provide the same degree of occupant protection during rollover accidents as the current active lap-shoulder belt system provides.

The second concern is the loading of the dummy's lower abdomen by the passive shoulder belt. This occurred during a simulated 30 mph, 90° car-to-car side impact with the dummy seated on the "far side." Unfortunately, there is no way of assessing the potential for injury using the current test

technology. However, we believe this loading pattern to be potentially serious during severe side impacts, because of the possibility of damage to internal organs. Lap or lap-shoulder belts, in contrast, apply restraint forces to the pelvic structure.

Even if these concerns about the possible performance limitations of such systems are not supported by the field accident data when it becomes available, we would still have reservations about the appropriateness of depending on a knee impact surface instead of a lap belt to provide lower torso restraint. We cannot be sure, for example, that a knee impact surfaced used in conjunction with a passive shoulder belt will adequately protect an out-of-position occupant, a small adult, or a child occupant in frontal or angular accidents because the performance of such a system is highly dependent on the spacing between the knee and the knee impact surface. This spacing is affected by the seat location and the occupant's leg orientation as well as the length of his upper leg.

Based on these considerations, we have concluded that it would be necessary to combine an active lap belt with the passive shoulder belt to provide occupant protection equal to that provided by use of active lap shoulder belts over the full range of accident conditions.

Although we have a number of practical reservations about the passive belt concept (some of which are discussed in a later section), we reiterate our proposal in D. E. Martin's December 8, 1975 letter to Dr. J. B. Gregory that the NHTSA institute a study of passive belt field accident data in a manner similar to that already being followed to evaluate air cushion restraint systems. We believe such a study is a necessary step towards determining the technical acceptability of such systems and would be an appropriate project for the Federal Government to undertake.

APPENDIX G — PLAINTIFF'S TRIAL COURT AVOWAL EXHIBIT #10, VOLKSWAGEN'S INQUIRY TO NHTSA DATED MAY 22, 1974

VOLKSWAGEN OF AMERICA, INC.
ENGLEWOOD CLIFFS, N.J. 07032

May 22, 1974

Mr. Lawrence R. Schneider
Chief Counsel
National Highway Traffic Safety
Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

Subject: MVSS 208, Occupant Protection - Request for Clarification

Dear Mr. Schneider:

With the publication of Docket 74-4, Notice 2 (39 FR 14593), Volkswagen believes that MVSS 208 now adequately addresses the basic requirements covering passive belt systems, such as the Volkswagen passive shoulder belt/knee bolster restraint described in our petition of October 1, 1973.

However, in the final development phase of our passive belt system the possible inclusion of two ancillary devices came under consideration:

(1) the addition of an active lap belt,

(2) the addition of a "comfort clip" to the passive shoulder belt to relieve the belt force against the occupant during non-impact conditions.

Appendix G

Volkswagen respectfully requests NHTSA clarification of the current Federal requirements covering each of these items, which are discussed in more detail below.

1. *Additional Active Lap Belt*

Here we are interested in the requirements for the installation of active lap belts together with passive restraints, where the requirements of MVSS 208 are met by the passive restraints alone.

To our knowledge, the last published NHTSA statement addressing this matter appeared in 35 FR 16928 (Pre-amble to Docket 69-7, Notice 7): "Under the standard as adopted manufacturers will be free to supply seat belts as optional or standard equipment, but may not use them to satisfy the requirements of the standard. Standard No. 210 will continue to require seat belt anchorages to be installed by manufacturers, so that persons who wish to have seat belts installed in their vehicles, for their own use or for use with child seating systems, will be able to do so."

Specifically, we would like to know if a Type 1 lap belt (conforming to MVSS 209) can be installed in addition to the Volkswagen passive shoulder belt/knee bolster system, under either of the following circumstances:

a) where a vehicle equipped with the passive belt system alone meets the requirements of S4.1.2.2 and S4.5.3 of MVSS 208 (second option for passenger cars manufactured from Sept. 1, 1973 to the time when this option expires);

Appendix G

b) where a vehicle equipped with the passive belt system alone meets the requirements of S4.1.3 (a) through (d) (1) proposed in Docket 74-14, Notice 1, and S4.5.3 of MVSS 208.

Our main area of concern in this matter is in regard to the latch mechanism. The passive shoulder belt would have a latch mechanism conforming to S7.2 of MVSS 208, as required under S4.5.3.3 (a). If the active lap belt is not governed by MVSS 208, the application of S7.2 (b) of MVSS 208 for simultaneous release of lap and upper torso restraint is questionable.

2. *Addition of "Comfort Clip"*

We are aware that certain vehicles equipped with upper torso restraints with emergency-locking retractors incorporate belt force relief devices ("comfort clips") to make wearing of the belt more comfortable. Although the specifications governing these devices have not been incorporated into the Safety Standards, we understand that correspondence between individual manufacturers and the NHTSA has addressed the guidelines for their use. Since such a "comfort clip" could be applied to the VW passive belt, NHTSA clarification of the regulations relating to this specific usage is requested.

Your early attention to these inquiries would be greatly appreciated, in view of the lead-time constraints we would be facing for possible incorporation of the described items in 1975 model vehicles.

Appendix G

Very truly yours,

s/ J. W. Kennebeck
J. W. Kennebeck
Manager
Emissions, Safety & Development

JWK/uj

APPENDIX H — PLAINTIFF'S TRIAL COURT AVOWAL EXHIBIT #11, NHTSA'S RESPONSE TO VOLKSWAGEN'S INQUIRY

U.S. DEPARTMENT OF TRANSPORTATION
NATIONAL HIGHWAY TRAFFIC SAFETY
ADMINISTRATION
WASHINGTON, D.C. 20590

[stamped]
JUN 28 1974

IN REPLY TO REFER TO:
N40-30 (TWH)

Mr. J.W. Kennebeck
Manager
Emissions, Safety & Development
Volkswagen of America, Inc.
Englewood Cliffs, N. J. 07632

Dear Mr. Kennebeck:

This responds to your May 22, 1974, question whether Volkswagen's passive belt system may be equipped with a "comfort clip," and whether an optional Type 1 lap belt may be offered in conjunction with passive system. Your passive system consists of an upper torso restraint and, in place of a lap belt, knee padding under the dashboard.

A vehicle which satisfies Standard No. 208, *Occupant crash protection*, may be equipped, at the option of the manufacturer, with additional safety belts which conform to Standard No. 209, *Seat belt assemblies*. Additional belts, like any required belt, must conform to the S7.2 requirements for latch mechanisms.

Appendix H

S7.2 *Latch mechanism.* A seat belt assembly installed in a passenger car shall have a latch mechanism —

(a) Whose components are accessible to a seated occupant in both the stowed and operational positions;

(b) That releases both the upper torso restraint and the lap belt simultaneously, if the assembly has a lap belt and an upper torso restraint that require unlatching for release of the occupant; and

(c) That releases at a single point by a push-button action.

This requirement assures that the occupant crash protection provided under Standard No. 208 is not diminished by a complicated and slow series of belt latch mechanisms which could otherwise be introduced into the vehicle.

Volkswagens' passive upper torso restraint and a separate active lap belt do not violate S7.2(b) in combination. Simultaneous release is required only "if the assembly has a lap belt and an upper torso restraint that require unlatching for release of the occupant." As described, Volkswagen's upper torso restraint does not require unlatching for release of the occupant.

With regard to our regulation of "comfort clips", we approved the use of a clip in a March 9, 1973, letter to General Motors, to relieve belt tension in limited circumstances. A copy of that letter is enclosed. In that case, the lap belt provided could be independently and firmly adjusted to limit occupant movement, providing protection in the event of lateral and rollover crashes. Until we have further details on the functioning of the Volkswagen clips, however, which we urge you to submit, we are

unable to determine whether it would conform to the adjustment requirements of S7.1.1 of Standard No. 208, *Occupant crash protection.*

Sincerely,

s/ Lawrence R. Schneider
Lawrence R. Schneider
Chief Counsel

Enclosure

cc: Dr. Ing. Hans-Jurgen Sassor
Audi NSU Auto Union Germany

(V) 94-1248
No.

Supreme Court, U.S.
FILED
JAN 23 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

WILMA O'BRYAN, Parent and Next of Friend of JOHN C. O'BRYAN,

-and-

STATE FARM INSURANCE,

Petitioners,

vs.

VOLKSWAGEN OF AMERICA,

-and-

VOLKSWAGEN A.G.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S MOTION TO DEFER CONSIDERATION

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Comes the Petitioner, Wilma O'Bryan, Parent and Next Friend of John C. O'Bryan and moves this Court to defer consideration of the present case until such time as this Court has

made a ruling in the case of *Freightliner Corporation v. Myrick,* Supreme Court No. 94-286. The question before the Court on both the *Freightliner* case and the Petitioner's case are identical; Does compliance with a Federal Motor Vehicle Safety Standard which establishes a minimum performance standard, preempt a state common law action based upon defective design and crashworthiness, or as the Eleventh Circuit has held in *Myrick,* does this Court's decision in *Cippollone,* as well as the clear, concise language of the Savings Clause, set out in the Safety Act, 15 U.S.C. sec. 1397(k), mean what it says, that "[c]ompliance with any Federal Motor Vehicle Safety Standard under this subchapter does not exempt any person from any liability under common law," and thus, state common law tort actions for defectively designed automobiles are not preempted and prohibited.

The Petitioner submits that the decision of this Court in the *Freightliner* case will also be the decision in the Petitioner's case. Additionally, if the Court upholds the lower court's decision in *Freightliner,* this Court must grant this Petitioner's Petition for Certiorari and rule that the trial court's verdict be reinstated or that the case be remanded back to the trial court for a new trial on the matter, following this Court's rulings.

For these reasons, the Petitioner, respectfully moves this Court to Defer Consideration of this case until this Court's decision in *Freightliners,* has been reached.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 13 1995
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No. 94-1248

In the Supreme Court of the United States

OCTOBER TERM, 1994

WILMA O'BRYAN, PARENT AND NEXT FRIEND OF JOHN C. O'BRYAN, AND STATE FARM INSURANCE,

Petitioners,

v.

VOLKSWAGEN OF AMERICA, INC. AND VOLKSWAGEN AG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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17pp

QUESTION PRESENTED

Whether this Court, pending the outcome of *Freightliner Corp.* v. *Myrick*, No. 94-286, should hold this petition for review of an unpublished opinion of the Sixth Circuit that reversed a jury verdict on a fact-specific ground that will not be affected by the outcome of *Myrick*.

RULE 29.1 STATEMENT

Respondent Volkswagen AG (VWAG), a corporation organized and existing under the laws of the Federal Republic of Germany, has issued shares that are traded on a public foreign exchange. Respondent Volkswagen of America, Inc. is a wholly owned subsidiary of VWAG and has issued no publicly traded shares.

Other major subsidiaries and affiliates of VWAG in which it has a substantial interest include:

AUDI AG
AUTOGERMA S.p.A.
Autolatina Argentina S.A.
Autolatina Brasil S.A.
Autolatina Commercio, Negocios e Participacoes Ltda.
Coordination Center Volkswagen S.A.
Europcar International S.A.
Financiera Seat, S.A.
InterRent-Europcar Autovermietung GmbH
Seat Leasing GmbH
Seat Motors International B.V.
Seat Kredit Bank GmbH
Shanghai-Volkswagen Automotive Company
Sociedad Espanola de Automoviles de
TAS Tvornica Automobila Sarajevo GmbH
Turismo, S.A.
V.A.G. France S.A.
V.A.G. Financement S.A.
V.A.G. Sverige AB
V.A.G. Transport GmbH & Co. OHG
V.A.G. Bank GmbH
V.A.G. LEASING GmbH
Volkswagen of Nigeria Ltd.
Volkswagen Canada Inc.
Volkswagen Investments Ltd.
Volkswagen International Finance N.V.

Volkswagen Bruxelles S.A.
Volkswagen Audi Nippon K.K.
Volkswagen de Mexico, S.A. de C.V.
Volkswagen of South Africa (Pty.) Ltd.
VOTEX GmbH
VW Credit, Inc.
VW-GEDAS & Co. Projektmanagement OHG

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1248

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Petitioners,

v.

VOLKSWAGEN OF AMERICA, INC. AND VOLKSWAGEN AG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Volkswagen of America, Inc., and Volkswagen AG respectfully submit this brief in opposition to the petition for certiorari filed in this case.

STATEMENT

This case involves automobile crashworthiness claims for enhanced injuries arising out of a very serious accident in which a 16-year-old, Chad O'Bryan, drove his family's 1987 Volkswagen Jetta off the highway at a speed in excess of the

55 m.p.h. speed limit. After running off the road the car collided with an embankment and rolled over. While inverted and still travelling between 40 and 50 miles per hour, it crashed into several telephone-pole-size logs. One log tore away the windshield pillar on the driver's side and folded the car roof inward, exposing the area where the driver's head normally would be located. The log then shattered the emergency release latch, disengaging the torso safety belt and striking the driver's door frame. As the car continued to rotate, it literally pole-vaulted on the log, generating a longitudinal force on the door frame in excess of 10,000 pounds, which elongated the door opening and unlatched the door. Still in an inverted position, the vehicle fell toward the ground, but before it landed the driver's door opened and O'Bryan was ejected. The vehicle eventually came to rest on top of O'Bryan, who was rendered a paraplegic. Pet. App. 5a-6a.

1. Wilma O'Bryan, Chad's mother (hereinafter "petitioner"), filed this diversity action as parent and next friend, naming as defendants the manufacturer of the Jetta, Volkswagen AG, and its wholly owned American subsidiary, Volkswagen of America, Inc. (hereinafter collectively "Volkswagen"). Petitioner did not contend that any defect in the Jetta caused the accident itself. Instead, she alleged that several defects in the car had enhanced the injuries that Chad suffered during the accident. In particular, petitioner claimed that but for defects in the Jetta's (1) door latch and (2) passive restraint system, Chad would have remained in the vehicle and not suffered the injuries he sustained.

Petitioner's claim of defect in the Jetta's passive restraint system had several components. The vehicle was equipped, among other things, with a two-point belt extending from the driver's right hip to left shoulder, where it was attached to the vehicle's door (so that no affirmative action was needed

to put the belt in place).[1] The emergency release mechanism was located near the door mounting. Petitioner asserted that this design was defective in three respects: (1) the emergency release mechanism should have been located between the two front seats rather than near the door mounting; (2) the belt should have been attached to a motorized track above the door rather than to the door itself; and (3) the Jetta should have been equipped with a manually activated "lap" belt in addition to its automatic shoulder-to-hip belt.

Prior to trial, Volkswagen moved for partial summary judgment on petitioner's manual lap-belt theory. Volkswagen maintained that this particular claim was preempted by the National Traffic and Motor Vehicle Safety Act (hereinafter "Safety Act"), 15 U.S.C. § 1392(d) (recently recodified at 49 U.S.C. § 30103(b)), and Federal Motor Vehicle Safety Standards (FMVSSs) 208 and 209, see 49 C.F.R. §§ 571.208, 571.209. FMVSS 208 granted to automakers the option of choosing from among three occupant restraint system designs in equipping 1987 models. Volkswagen chose to install a two-point passive restraint system with additional features rather than a system that would have included a manual lap belt. The district court granted Volkswagen's motion for partial summary judgment, holding that petitioner's claim based on the absence of a manual lap belt was preempted by federal law. Pet. App. 14a-26a. Petitioner was, however, permitted to introduce evidence of alternative passive restraint designs that included a lap-belt feature.

After trial, the jury returned a verdict of $5,930,499.74 in petitioner's favor, apportioning 85% of the fault to Volkswagen and 15% to Chad O'Bryan. Volkswagen's post-

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[1] The vehicle's passive restraint system also included a specially designed seat (which minimized movement) and a "knee bolster" (designed to absorb and prevent forward movement). Pet. App. 5a.

trial motions were denied, and it took an appeal. Petitioner cross-appealed several pretrial and trial rulings, including the dismissal of her manual lap-belt claim on grounds of federal preemption.

2. A panel of the Sixth Circuit unanimously reversed in an unpublished, *per curiam* opinion. Pet. App. 3a-13a. Based on "a careful review of the record," the court of appeals concluded that petitioner had failed to prove the indispensable element of causation in her design defect claims and that, accordingly, Volkswagen was entitled to judgment notwithstanding the verdict. *Id.* at 4a-5a.

After reviewing the evidence presented at trial, the court of appeals explained that, under Kentucky law, the plaintiff "has the burden of establishing that the circumstances surrounding the accident were such as to justify a reasonable inference of probability, rather than a mere possibility, that the alleged design defects were responsible for the injuries." Pet. App. 10a (citations omitted). Moreover, in advancing "crashworthiness" claims such as those involved in this case, the plaintiff is required not only (1) to "establish[], by competent expert testimony, that the defect was responsible to some degree for enhancement of injury to the plaintiff," but also (2) to present "competent evidence of some practicable, feasible, safer, alternative design." *Id.* at 11a.

The court of appeals held that petitioner failed to satisfy either of these requirements. Petitioner's design defect claims were premised on the theory that if the door latch and passive restraint system had been designed differently, Chad O'Bryan would not have been thrown from the vehicle and would have sustained no (or less severe) injuries. Although "the issue of whether or not O'Bryan would have been injured had he remained in the car was raised, at least superficially, during

the trial," the court explained that it "was never established by competent proof one way or another." Pet. App. 7a. Thus,

> one of the experts called by the plaintiff did testify that O'Bryan would have remained unharmed if he had not been ejected from the car, but this witness stated no basis for his opinion. Given the condition of the roof after the accident and the fact that the Jetta hit the ground at the terminus of its "pole vault" in an inverted position and continued to roll, this assertion appears to have no factual basis. Indeed, one of Volkswagen's experts testified that Chad O'Bryan would have experienced fatal head, brain, neck and chest injuries, based on the circumstances of the wreck and the ultimate condition of the car.

Id. at 12a. See also *id.* at 7a ("[G]iven the fact that one log peeled back the roof of the car and that the car continued to roll after that, it was incumbent upon the plaintiff to prove that he would have been injury-free if restrained in his seat."). Because petitioner "failed to prove causation," *i.e.*, did not prove that the claimed defects in the door latch and passive restraint system caused Chad O'Bryan to suffer any enhanced injuries, Volkswagen was entitled to judgment as a matter of law. *Id.* at 13a.

The court of appeals also held that petitioner failed to present sufficient evidence of a practicable and safer alternative design for either the Jetta's door latch or its passive restraint system. Pet. App. 12a. As for the door latch, petitioner "proposed no alternate design for a more crashworthy door lock, nor did [she] address the possibility that the door opened because the surrounding structure stretched out of contact with the latch mechanism." *Ibid.* And although petitioner's experts "opined that a motorized track or a three-point passive system is 'better' or 'superior,' they failed to establish that a different restraint system would have prevented or diminished Chad O'Bryan's injuries." *Ibid.*

In reversing for failure of proof on causation, the court of appeals did not discuss petitioner's preemption argument. It noted, however, that its disposition of the case "pretermit[s] discussion of those issues raised on appeal that are not directly related to causation." Pet. App. 5a.

3. Petitioner filed a petition for rehearing and suggestion for rehearing en banc. In that document, petitioner in no way suggested that the trial court's preemption ruling had any effect on her ability to submit evidence on the issue of causation (indeed, she made no mention of preemption in the portion of her rehearing petition devoted to causation). Nor did petitioner urge the court to decide the preemption issue. Petitioner did complain, however, about the panel's independent determination that there was insufficient evidence of alternative designs, arguing that the trial court's preemption ruling had impeded her ability to present such evidence. Plaintiff-Appellee, Cross Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc, at 10-12.

In denying the rehearing petition, the panel stated that it had "further reviewed" petitioner's submissions and "conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." Pet. App. 2a. No judge having requested a vote on the suggestion for en banc rehearing, it too was denied. *Id.* at 1a.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to issue a writ of certiorari to decide whether federal law preempts her common law claim for damages based on the absence of a lap belt in the 1987 Jetta. Pet. 15-23. Alternatively, petitioner asks this Court to hold the petition pending the Court's decision in *Freightliner Corp.* v. *Myrick*, No. 94-286 (to be argued Feb. 22, 1995). *Myrick* involves the issue whether a common law claim for damages based on the absence of an antilock braking device

in a truck is preempted by the Safety Act, 15 U.S.C. § 1392(d) (recodified at 49 U.S.C. § 30103(b)), and by a different Federal Motor Vehicle Safety Standard than is involved in this case.[2] Petitioner's Motion to Defer Consideration, at 1-2. This Court should reject both of petitioner's requests.

To begin with, the court of appeals' decision simply does not present the preemption issue that petitioner asks this Court to review. The Sixth Circuit did not decide the preemption issue. Rather, the court of appeals "pretermit[ted] discussion of th[at] issue[]" (Pet. App. 5a) by holding that petitioner had failed altogether to carry her burden of proof on the issue of causation. This failure of proof was as fatal to petitioner's preempted claim as it was to petitioner's non-preempted claims. In other words, even if petitioner had been permitted to present to the jury her claim that the Jetta's passive restraint system was defectively designed because it lacked a manually activated lap belt, petitioner *still* would have been required to prove that if Chad O'Bryan had remained in the car rather than been thrown from it, he would have suffered less severe injuries. The Sixth Circuit held that petitioner failed, as a matter of law, to make that factual showing. This total failure of proof on causation dooms petitioner's lap-belt claim as well.

Nor is there anything about what the Sixth Circuit *did* decide that warrants further review by this Court. The court of appeals' brief, *per curiam* decision is unpublished. It

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[2] In an *amicus curiae* brief filed with this Court in *Myrick*, the Solicitor General, on behalf of the United States, has distinguished between the preemptive effect of FMVSS 208, applicable here, and the braking standard involved in *Myrick*. See Br. for the United States as Amicus Curiae Supporting Respondents, No. 94-286, at 28-29 ("Interference with that federally protected freedom of choice through state tort judgments would have conflicted with Standard 208.").

creates no conflict with any other court. It does not discuss any legal issue of broad significance (indeed, its discussion of legal issues is limited to Kentucky's law of causation and crashworthiness). And, as just explained, it avoids resolution of the preemption issue highlighted by petitioner by deciding the case on a logically distinct and independently dispositive ground. The court's actual holding rests entirely on conclusions that are highly fact- and case-specific and are controlled by application of established state law.

Petitioner nonetheless contends that this Court's decision in *Myrick* might have some impact on the outcome of this case because "the trial court's erroneous preemption ruling forbade the Petitioner from putting on the very evidence that the court of appeals thought was needed." Pet. 15. More specifically, petitioner maintains that "the trial court summarily prohibited [her] from introducing evidence of other practicable, feasible, safer, alternative designs." *Id.* at 16. See also *ibid.* (stating that "the trial court's preemption ruling prohibited the Petitioner from introducing comparative studies indicating the Volkswagen passive restraint system to be the least effective of all the restraint systems utilized by automobile manufacturers"); *id.* at 17-18 (describing evidence assertedly excluded based on preemption ruling). This argument fails for two reasons.

First, the argument is directed at only one of the two major deficiencies of proof relied on by the Sixth Circuit in ordering judgment as a matter of law for Volkswagen. As discussed above, the court of appeals held that petitioner failed to prove two elements common to all of her design defect claims: (1) that the defect caused some enhancement of the injuries (*i.e.*, that Chad O'Bryan would not have been injured, or would have sustained less severe injuries, had the door latch or passive restraint system kept him in the Jetta), and (2) that there existed "some practicable, feasible, safer, alternative design." Pet. App. 11a. Even if the trial court relied on its preemption ruling in excluding evidence of one

alternative design of the Jetta's restraint system (*i.e.*, a system that included a lap belt),[3] the preemption ruling in no way hindered petitioner from attempting to prove causation. As the Sixth Circuit held, however, petitioner failed to show that if Volkswagen had employed an alternative design that would have kept Chad in the Jetta, he would have been spared the injuries he sustained when thrown from the vehicle. Significantly, petitioner does not contend that the trial court's preemption ruling prevented her from submitting any evidence on the causation issue.

Second, petitioner's rehearing petition in the Sixth Circuit argued at length (at pages 10-12) that it was unfair, in view of the trial court's exclusionary rulings, to hold petitioner responsible for failing to prove the existence of feasible, alternative designs to the Jetta's door latch and passive restraint system. But petitioner did *not* argue that the trial court's preemption ruling had any effect on her ability to prove *causation* or on the Sixth Circuit's resolution of the *causation* issue. In denying rehearing, the panel stated that it had "conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." Pet. App. 2a. In other words, the court of appeals concluded that petitioner's argument concerning the impact of the preemption ruling on her ability to show alternative designs was simply irrelevant to the outcome of the appeal (because she had failed to prove the independent element of causation). The court of appeals' denial of rehearing after "further review" demonstrates beyond question that even a remand after this Court's decision in

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[3] Despite the trial court's preemption ruling, petitioner was allowed to present evidence of alternative designs incorporating lap belts that might have prevented Chad from being thrown from the car. Pet. App. 7a.

Myrick would have absolutely no effect on the Sixth Circuit's decision.[4]

Because the preemption issue is not presented by the Sixth Circuit's decision, there is no reason for this Court to grant the petition. And because even a reversal of the trial court's preemption ruling would have no bearing on the Sixth Circuit's resolution of this case, there is no reason to hold this case pending the outcome of *Myrick*.

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[4] We note, moreover, that petitioner is plainly mistaken in suggesting that following a favorable ruling in *Myrick* this Court could "rule that the trial court's verdict be reinstated." Motion to Defer Consideration, at 2. The verdict in this case was overturned on causation grounds, and petitioner has not sought review of that determination. Thus, at most, this Court could remand to the court of appeals with instructions to consider whether the precluded evidence on yet another alternative design would alter its decision that petitioner "failed to prove causation." Pet. App. 13a. The court of appeals has decided that fact issue twice already.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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